Supreme Court, U.S.
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NO. 94-1575

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

John S. Risbeck, et ux.,
Petitioners,

v.

Joseph C. Bond, et. ux., et al.,
Respondents.

On Petition for a Writ of Certiorari to
the Missouri Court of Appeals,
Southern District

RESPONDENT'S BRIEF IN SUPPORT OF PETITION

Kenneth E. Hawley,
Pro se respondent.
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QUESTIONS PRESENTED FOR REVIEW

These questions are subsidiary questions that are fairly included in Petitioners' question number 2.

1. Whether Section 484.020.1 RSMo 1986 is unconstitutionally vague and in violation of due process requirements, by failing to give adequate notice that the statute applies to a layman, attorney in fact, acting pursuant to a power of attorney.

2. Whether the Missouri court policy of defining what is and what is not the authorized and unauthorized practice of law on a case by case basis, violates due process requirements by not providing a clearly defined standard which gives notice to the public as to what exactly is prohibited.

PARTIES TO THE PROCEEEDING BELOW

John S. Risbeck, Petitioner

Peggy J. Risbeck, Petitioner

William V. Jones, Respondent

Dena Jones, Respondent

Joseph C. Bond, Respondent

Cathy E. Bond, Respondent

Ethel B. Jones, Respondent

Earle M. Merritt, Respondent

Eva E. Merritt, Respondent

Kenneth E. Hawley, Respondent

Non parties whose interests and positions may be affected by review:

Robert and Wanda Davis

Jay Nixon, Attorney General of Missouri

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Respondent's Interest In The Case And Facts Supporting Claim Of Being An Omitted Party Pursuant To Rule 12.4

I serve the petitioners in a fiduciary capacity as their attorney in fact. My interest in this case is in every practical sense identical with that of the petitioners. Our principal/attorney in fact relationship is but the medium through which the petitioners seek to make more effective the expression of their own views in petitioning the government for the redress of grievances.

My relationship to the petitioners is essentially analogous to that of the N.A.A.C.P. and its members, as this court has determined in N.A.A.C.P. v. Button, 371 U.S. 415, 443, 9 L.Ed. 2d 405, 424.

> "[the NAACP] and its members are in every practical sense identical. The Association,...is but the medium through which its individual members seek to make more effective the expression of their own views."

I am interested in the outcome of this case because, this court may determine whether Missouri law and the Constitution of the United States allows an attorney in fact, that is not also a licensed attorney at law, to execute and deliver petitions for a principal and to speak for them in court. This issue is of particular interest to me since, the State of Missouri attempted to prosecute me for practicing law without a license and may again initiate another prosecution for my role in assisting the petitioners with their appeals.

My status as a party below is evident from the following facts in the record:

1. All of the motions, pleadings and other captioned documents filed in the Phelps County Circuit Court on behalf of the petitioners identified and named the plaintiffs in the following manner in the caption:

John S. Risbeck and
Peggy J. Risbeck, Plaintiffs,
By and Through Kenneth E. Hawley,
Plaintiff's Attorney in Fact.

See: Petition To Quiet Title, Notice of Lis Pendens, Amended Petition To Quiet Title, Judgment attached to Motion For Default Judgment According to Rules 54.02 and 74.05, and Motion To Vacate Judgment Pursuant To Rule 75.01, Phelps County Circuit Court Case Number CV393-0217CC and Appellants' Legal File On Appeal Number 18888-2 In the Missouri Court of Appeals Southern District, pages 10 and 28.

2. All of the pleadings, notices and motions mentioned in the above paragraph were signed by Kenneth E. Hawley. Ibid.

3. The defendants were directed by the clerk to serve a copy of their pleading upon Kenneth Hawley at his address. Appellants' Legal File On Appeal, supra, pages 2, 4, 6, 8, 19, 21, 23, and 25.

4. In the Case History in the Phelps County Circuit Court, on page 3, the first entry for 05/03/93 identifies the attorney in fact that filed the amended petition as a "third party."

5. On June 10, 1993, at the only court hearing in this case, Hawley was the only party that spoke to the court. The petitioners were also present but they did not say even one word. See Appellants' Transcript On Appeal, pages 2-4.

6. I was named in the judgment of the Phelps County Circuit Court, but not by my name. Instead of my name, I was identified by my statutory title of "attorney in fact" and by the word "person" as is indicated in the quotation below.

> "Case dismissed. The motions to dismiss filed by defendants herein are sustained as plaintiff's petition is filed by 'attorney in fact' [Kenneth E. Hawley] not by 'attorney at law' and therefore is subject to dismissal because of the unauthorized practice of law by a

person [Kenneth E. Hawley] who is not an attorney at law in the state of Missouri. Douglas E. Long, Jr., Judge."

7. The minutes of the Phelps County Circuit Court show that the court sent copies of the above judgment to the following parties: Kenneth Hawley, the attorneys for the defendants C. William Lange and John Z. Williams that were not present at the hearing, and the Phelps County Assistant Prosecuting Attorney Patrick King that witnessed the hearing where I spoke for the petitioners. The petitioners did not receive from the court a copy of the judgment dismissing their case.

8. At the direction of the petitioners, the Phelps County Circuit Court, the Missouri Court of Appeals, and the Supreme Court of Missouri all communicated with the petitioners by responding directly to Kenneth E. Hawley at Hawley's address and

telephone number.

9. Although I have not signed any court pleadings on appeal, I have continued to act as the petitioner's attorney in fact throughout all the appeals process.

Only parties may be named in the caption of the case. In general, only pro se parties or a licensed attorney at law can sign and file pleadings and motions, receive responsive pleadings, notice and docket hearings, speak as a litigant in court, and receive the official communications of the actions of the court. From the beginning of this action, I have been accorded the legal rights of the petitioners, and have been treated and named by the court as a third party.

STATEMENT OF THE CASE

The statement of the case in the Petition For A Writ Of Certiorari Sections A and B on pages 3-5 are incorporated herein

by reference. The following needs to be added at the end of Section B.

On July 30, 1993, I was criminally charged with a non-class misdemeanor of practicing law without a license. The charge alleged that I made an appearance in a representative capacity on behalf of someone else in the Circuit Court of Phelps County, Missouri, in the case styled John S. and Peggy J. Risbeck v. Joseph C. Bond, et. al, No. CV393-0217CC in violation of Section 484.020, RSMo.

I challenged the constitutionality of the statute, alleging that it violated the due process clause of the Missouri and the United States Constitutions. I also defended my action by a claim of right under the First Amendment of the Constitution of the United States and by the authority given in Section 404.710 RSMo (1992 Supp.) which outlines the authority, rights and

privileges of an attorney in fact.

As a result of my affirmative defenses, and without obtaining any concessions, promises or plea agreements from me, on January 20, 1994 the prosecuting attorney dismissed the charge.

SUMMARY OF ARGUMENT

In reviewing a statute affecting First Amendment rights, this court should also consider other possible factual applications in addition to the facts in the case at bar. A criminal prosecution resulted from the events of this case. The facts and issues in the criminal case also has a direct effect on obtaining a just outcome of the petitioners' case. The facts and constitutional issues associated with the criminal case should also be considered in reviewing the petitioners' case.

The trial court's actions provide evidence that the judgment dismissing peti-

tioners' case, was based upon the statutes that define the practice of law and which prohibit the practice of law by any person that is not duly licensed therefore. If these statutes are found to be unconstitutionally vague, then the order dismissing the case is a nullity.

In determining the constitutionality of a statute affecting First Amendment freedoms, the court applies strict standards requiring very specific and narrowly written regulations in order to avoid, in the statute's application, the infringement of First Amendment freedoms.

A statute is unconstitutionally vague when it fails to give notice as to whom it applies, or fails to give notice as to what is prohibited. Vague statutes violate the principles of the due process clause. The associated criminal case that charged respondent with practicing law without a

license, provides probative evidence that the Missouri statutes prohibiting the practice of law by unlicensed persons are unconstitutionally vague.

Missouri's practice of law statutes are unconstitutionally vague because they fail to make clear whether a personal appearance as an attorney in fact in a fiduciary capacity, and the execution and filing of a petition in that capacity, is or is not the appearance as an advocate in a representative capacity.

Missouri courts have declared that they will not be hindered by the legislature in their function of defining and regulating the practice of law. By not defining the practice of law, the court decides on a case by case basis what is or is not the unauthorized practice of law. This results in the court constructing statutes, without any enforceable standard. This prac-

tice violates due process principles as expressed by this court.

The statute says an attorney in fact can execute and deliver petitions and the respondent and petitioners in good faith acted upon that authority. The Court of Appeals, in affirming the trial court's dismissal of the case, says such an attorney in fact must also be an attorney at law. This limitation to the statute that was added by the court, conflicts with the authority granted in the statute in a manner that unjustly punishes the petitioner for doing what the statute says can legally be done. In addition the Court of Appeals ruling creates a crime, nunc pro tunc, that originates in the common law which is contrary to Missouri's criminal code.

ARGUMENT SECTION

A. Court Can Consider Applications Of Statute In Other Factual Contexts

In considering the allegations that the statutes are unconstitutional which are raised in this brief and in the petition for writ of certiorari filed herein, this court should not limit its consideration to just the facts that are included in the petition for writ of certiorari. Since the rights of the petitioners and myself, acting as their attorney in fact, are inseparable, the constitutionality and the inhibiting effect of the application of Section 484.020 RSMo in the State's attempt to convict me for practicing law without a license should also be considered. The concept of not limiting the court's consideration to just the facts at bar is well established in First Amendment cases.

> "Furthermore , the instant decree may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar....[citations omitted] It makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement." N. A. A. C. P. v. Button, supra. U.S. 432.

B. Trial Court Acted In Reliance Upon Sections 484.010 And 484.020 RSMo 1986

That the trial court sustained respondent's motions to dismiss in reliance upon Sections 484.010 and 484.020 RSMo 1986 is evident in the following ways:

1. The motion to dismiss filed by C. William Lange, which the court sustained, referred to Chapter 484 for authority in support of the motion.

2. The trial court confessed belief in a law that makes filing a petition or ap-

pearing for someone without having a bar number to be the unauthorized practice of law.

3. The trial court, after sustaining respondent's motions to dismiss:

A. called for the prosecuting attorney,

B. asked the prosecuting attorney to take note that I was not admitted to the Bar in Missouri and was practicing law in the Courts of Phelps County, and

C. turned the case over to the prosecuting attorney. See Transcript p. 4.

If Sections 484.010 and 484.020 RSMo are unconstitutional, as petitioners and this respondent allege, then the judgment dismissing petitioners' case is a nullity.

C. Strict Standards Apply To Regulations In The Area Of First Amendment Freedoms

The practice of law statutes impose criminal sanctions upon and severely limit the exercise of the Constitutionally guar-

anteed rights of freedom of speech, assembly and to petition the government.

In the case at bar, petitioners, in the Petition For A Writ Of Certiorari outline their claim of right under the First Amendment to have an attorney in fact speak for them in the state's court, on pages 25-34. By stating that the policy of the court and its application of Section 484.020 RSMo 1986 is in conflict with the First Amendment, and by the statement that 28 USC § 2403(b) may be applicable, the petitioners are challenging the constitutionality of the state statute.

This court should not presume that the statute and the Missouri court policy curtails constitutionally protected activity as little as possible. The principles in N.A.A.C.P. v. Button are controlling here.

"If the line drawn by the decree be-

> tween the permitted and prohibited activities of the NAACP, its members and lawyers is an ambiguous one, we will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissible statutory vagueness are strict in the area of free expression." N.A.A.C.P. v. Button, supra. U.S. p. 432.
>
> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." Ibid. at U.S. 433.

D. Vague Statutes Violate Principles Of Due Process

That the definitions for the practice of law and the doing of law business in Section 484.010 RSMo 1986 are unconstitutionally vague are manifested in the facts arising from this case. Judge Douglas E. Long, Jr. dismissed the petitioner's case on belief that the statutes prevented me from executing and delivering a petition and appearing with the petitioners in the Phelps County Circuit Court. But the prosecuting attorney was convinced by my af-

firmative defenses that the statute was not adequate to convict me for appearing with the petitioners in open court. The judges and the prosecuting attorney differred as to the statute's application to the facts of this case.

That men learned in the law cannot agree on the application of the statute, is probative evidence that the statute is unconstitutionally vague. As this court has said in Baggett v. Bullitt, 377 U.S. 360, 367, 12 L.Ed. 2d 377, 382, 84 S.Ct. 1316,

> "...a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law."

Due process requires that penal statutes not leave room for speculation as to what is required or forbidden.

> "As a matter of due process, no one may be required at peril of life, liberty or property to speculate as to

> the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids." Hynes v. Mayor of Oradell, 425 U.S. 610, 620, 48 L.Ed. 243, 253, 96 S.Ct. 1755.

E. Practice Of Law Definition Fails To Define A Key Phrase So As To Give Notice As To Whom The Statute Applies

The definition of the practice of law in Section 484.010.1 RSMo 1986 is unconstitutionally vague by not defining precisely what constitutes "the appearance as an advocate in a representative capacity," so as to give notice as to whom the statute is intended to apply.

When a principal, pursuant to Section 404.710.1 RSMo (1992 Supp.),

> "...delegate[s] to an attorney in fact in a power of attorney general powers to act in a fiduciary capacity on the principal's behalf..."

there is no reason to conclude that the statute defining the practice of law attaches criminal liability to someone acting pursuant to Section 404.710.1 RSMo

(1992 Supp.).

Without a precise definition of what constitutes the "appearance as an advocate in a representative capacity" making clear that it either includes or excludes the appearance as an attorney in fact in a fiduciary capacity, Section 484.010 and 484.020 are unconstitutionally vague.

F. Missouri Court Opinions Conflict With Due Process Decisions Of This Court

Missouri's court has said,

> "The legislative department, under the police power, may enact laws declaring that certain acts constitute unauthorized practice of law and are punishable." Automobile Club of Missouri v. Hoffmeister, 338 S.W. 2d 348, 355.

By implication, if the legislature can declare that certain acts constitute the unauthorized practice of law, they can also declare, that certain acts that would otherwise be prohibited, are allowed as exceptions to the practice of law definition. For example, both Section 532.020

and 404.710 RSMo give laymen, acting on behalf of someone else, authority to sign petitions.

> "Application for the writ shall be made by petition, signed by the party for whose relief it is intended, or by some person in his behalf, to some court of record, or to any judge thereof other than a municipal judge." From Section 532.020 RSMo 1986.

Missouri courts have upheld this statute in the following way:

> "The exception formulated in Hackin allowed a layperson to prepare and file a petition for writ of habeas corpus on behalf of another;...
>
> "This court adopts the exception created by and the reasoning advanced in the Hackin case....This holding applies only to the preparation and filing of habeas petitions....Such activity is an exception to the practice of law definition under Section 484.010.1, supra, and therefore does not constitute a misdemeanor." State v. Carroll, 817 S.W. 2d. 289, 291 (Mo. App. 1991).

In like manner, Section 404.701.4 says in part:

> "Except as provided in subsections 6 and 7 of this section, an attorney in fact has, with respect to the subjects

> or purposes for which the powers are conferred, all rights, power and authority to act for the principal that the principal would have with respect to his or her own person or property as a nondisabled and nonincapacitated adult; and without limiting the foregoing has with respect to the subjects or purposes of the power complete discretion to act or not act, to consent or not consent to, or withdraw consent for, any act, and to execute and deliver or accept any deed,...proof of claim, petition or other pleading,...or other document necessary or convenient to implement or confirm any act, transaction or decision."

The Court of Appeals in the case at bar has in effect nullified the authority granted an attorney in fact by the statute by interpreting the statute according to their policy which they claim supercedes the statute.

> "Missouri has adopted a policy that the practice of law and the doing of law business, both in and out of its courts, shall be limited to persons with specific qualifications and duly licensed as attorneys....
>
> "An agent or attorney in fact, who is not an attorney at law, cannot file pleadings for another or otherwise practice law." Risbeck v. Bond, 885 S.W. 2d. 749, 750 (Mo.App. S.D. 1994).

This interpretation is obviously not what the legislature intended to convey. An attorney at law already has authority to execute and deliver petitions and other pleadings, because of his/her license to practice law. One does not have to appoint an attorney at law to act as attorney in fact, in order for the attorney at law to be able to execute and deliver petitions on behalf of someone else!

This illogical interpretation of the statute by the Court of Appeals arises from the fact that the court refuses to be bound by the statutory definition of the practice of law, and by implication, the exceptions to the definition that are in other statutes like Section 404.710, supra.

> "Moreover, it is the responsibility of the judiciary to determine what constitutes the practice of law, both authorized and unauthorized....The legislature may assist the supreme court by

> providing penalties for the unauthorized practice of law,...but the legislature can in no way hinder, interfere, or frustrate the supreme court's inherent power to regulate the practice of law." Risbeck v. Bond, supra.
>
> "The power to regulate and define the practice of law and the doing of law business is a prerogative of the judicial department. The legislative department, under the police power, may enact laws declaring that certain acts constitute unauthorized practice of law and are punishable. But such statutes are merely in aid of, and do not supercede or detract from the power of the judicial department to define and control the practice of law....
>
> "What constitutes the practice of law and the doing of law business is extremely difficult to define. Courts have therefore been reluctant to adopt an all-inclusive definition of those terms. Rather the determination of any issue that presents the question must depend upon the facts in each particular case." Automobile Club of Missouri v. Hoffmeister, supra.

These opinions demonstrate that the courts, on a case by case basis, may, or may not choose to be influenced, limited, or otherwise bound by legally legislated, fixed standards, of what constitutes statutory exceptions to the definition of the

practice of law.

The vague practice of law and doing of law business statutory definitions, and the policy of the Missouri courts of avoiding an all inclusive definition of those terms, leaves the public, judges, and juries free to decide on a case by case basis what is prohibited without any fixed standards. These standardless definitions and court policies violate the principles of due process.

This Court has said,

> "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurers free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case...
>
> "Certainly one of the basic purposes of the Due Process Clause has always been to protect a person having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an un-

derstandable meaning with legal standards that courts must enforce." Giaccio v. Pennsylvania 382 U.S. 399, 402-403, 15 L.Ed. 2d 447, 450, 86 S.Ct. 518.

G. Conflict Between Missouri Court Opinion And Power Of Attorney Statute Unjustly Punishes The Petitioners

As the facts of this case demonstrate, Section 404.710 RSMo (1992 Supp.) gives an attorney in fact authority to execute and deliver petitions and other pleadings. And, the Missouri Court of Appeals has said that the attorney in fact that executes and delivers petitions must also be a licensed attorney at law.

The plain meaning of the Court of Appeals' ruling is that a layman acting as an attorney in fact can perform any of the acts authorized in Section 404.710 except execute and deliver petitions and other pleadings. By saying that only an attorney in fact that is also an attorney at law can be authorized to execute and deliver

petitions and other pleadings, the Court of Appeals has acted nunc pro tunc by correcting the language and meaning of the statute.

The Court of Appeals construction of Section 404.710 makes the executing and delivering of a petition by a layman attorney in fact to be the crime of practicing law without a license. In Missouri there are no common law crimes. Offenses must be defined by statute.

> "No conduct constitutes an offense unless made so by this code or by other applicable statute." Section 556.026 RSMo 1986.
>
> "'**Offense**' means any felony, misdemeanor or infraction." Section 556.061 (19) RSMo 1986.

Neither Section 404.710 or Section 484.010 RSMo, or any other Missouri statute informs the public that an attorney in fact that executes and delivers petitions must also be an attorney at law.

The construction of Section 404.710 by the Court of Appeals, as outlined above, is in conflict with the decision of this court as expressed in United States v. Laub, 385 U.S. 475, 486-487, 87 S.C. 574.

> "If there is a gap in the law, the right and duty, if any, to fill it do not devolve upon the courts....
> "Crimes are not to be created by inference. They may not be constructed nunc pro tunc."

Because of the authorization given to an attorney in fact in the statute and a constitutional claim of right, criminal charges of practicing law without a license were dismissed. Additionally, for acting on the authorization in the statute and a constitutional claim of right, the petitioners' case has also been dismissed. It is fundamentally unfair for me to get by with impunity for my role in assisting the petitioners in presenting their cause to the court, while the petitioners are

punished by having their case dismissed, since I assisted them in making their petition to the court.

Although petitioners are not being criminally punished, the principles outlined in United States v. Laub are controlling here.

> "Ordinarily, citizens may not be punished for actions undertaken in good faith reliance upon authoritative assurance that punishment will not attach. As this Court said in Raley v. Ohio, 360 US 423, 438, 3 L Ed 2d 1344, 1355, 795 SCt 1257, we may not convict 'a citizen for exercising a privilege which the state clearly had told him was available to him'" Ibid. U.S. 487.

Since the petitioners and I were acting in good faith reliance upon authority given to us by the state in Section 404.710 RSMo (1992 Supp.), therefore the judgment dismissing petitioner's case should be reversed.

CONCLUSION

When an untrained layman cannot afford

to hire an attorney at law, the functioning of the court would work more efficiently and the petitioner's ideas would be expressed more effectively, when assisted by another layman that has some degree of legal training, knowledge and experience. The appearance as an attorney in fact in a fiduciary capacity should be treated by the courts in the same manner as if the principal appeared pro se.

Respondent prays that the court grant certiorari, reverse the judgment, and remand the action back to the trial court with instructions to allow respondent to speak and act according to the will and wishes of the petitioners in the Phelps County Circuit Court.

Respectfully Submitted by:

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